

¹ ALJ Award (Aug. 28, 2006) at 5.

and claimant was not entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a).

The claimant requests review of the nature and extent of his disability arguing that he is entitled to a whole body impairment and work disability based upon a 100 percent wage loss and an 84 percent task loss, which yields a 92 percent work disability.

Respondent argues that the Award should be affirmed except on the issue of TTD. Respondent maintains the claimant was released, without restrictions, by the authorized treating physician as of March 24, 2004. And because respondent had work available to claimant which he refused to perform, the claimant is, therefore, not entitled to the TTD benefits.

The issues to be resolved in this appeal are the nature and extent of claimant's impairment and whether claimant is entitled to the TTD benefits for the additional period from March 24 to July 26, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ succinctly and accurately set forth the facts surrounding this claim in the Award and the Board adopts that statement as its own. Highly summarized, claimant sustained a compensable series of injuries to his right shoulder culminating on March 24, 2004.² On that date, claimant was released by Dr. Hughes, the treating physician, without restrictions, to return to work. However, claimant testified he was continuing to experience pain in his right shoulder and as well as his left, due to overcompensation while working. It is worth noting that the medical records reflect little if any complaints to the left shoulder. Claimant contacted his employer and according to him, he explained that he intended on taking additional time to rest in the hopes of alleviating his symptoms. Respondent interpreted this action as a refusal to work and claimant was terminated.

After a preliminary hearing and a series of examinations, claimant was referred to Dr. John Osland, a board certified orthopaedic surgeon, who first saw claimant on February 17, 2005. On April 13, 2005, Dr. Osland performed arthroscopic surgery on claimant's right shoulder, performing a SLAP procedure³, as well as a debridement of a small area of fraying on the posterior labrum, a subacromial decompression and a distal

² Claimant experienced right shoulder pain before March 24, 2004. But due to the repetitive nature of the job, the parties agreed that March 24, 2004 was claimant's date of accident as that was his last date of work at his regular duties.

³ Superior labral procedure from the anterior-posterior position.

clavicle excision. He offered claimant another procedure to address some resulting bone growth, but claimant declined. Dr. Osland released claimant at maximum medical improvement and assigned him a 17 percent permanent partial impairment to the right shoulder.⁴ His report indicates that he converted that rating from one to the shoulder to a whole body, which yields a 10 percent.

At his deposition, Dr. Osland testified that claimant was referred for treatment to his right shoulder and that his treatment was limited to that area.⁵ However, he also testified that he performed a foraminal encroachment test on claimant to determine whether claimant's neck was affected by his injury. And according to his office notes, Dr. Osland noted some pain on the right side of claimant's neck during this test.⁶ But he maintained that the situs of claimant's impairment is at the shoulder.⁷ Dr. Osland observed no spasms during any of his examinations and according to him, if claimant was having any sort of spasms in the paraspinals that would be due to something other than claimant's work-related injury. He further testified that the conversion of the 17 percent functional impairment to the shoulder to a whole body rating was done merely as a simple conversion and was not done to suggest a whole body rating was appropriate.⁸

Claimant was also evaluated by Dr. Pedro Murati, on two occasions. The first was on May 5, 2004 in connection with claimant's request for additional medical treatment following his termination from respondent's employ. At that visit, Dr. Murati diagnosed right carpal tunnel syndrome with referred pain to the right shoulder, right rotator cuff tear and myofascial pain from the right shoulder to the cervical paraspinals. Dr. Murati opined that claimant should not have worked after March 24, 2004, as he was still having problems with his shoulder.

Dr. Murati saw claimant again in October 2005, six months after his shoulder surgery and following this evaluation, he diagnosed right ulnar cubital tunnel syndrome and myofascial pain from the right shoulder girdle extending to the paraspinals. He assigned a 33 percent permanent partial impairment to the right upper extremity plus an additional 5 percent (DRE II) whole body impairment for the myofascial pain. Dr. Murati testified that claimant's condition involves his neck because the "neck and shoulder are non-divisible".⁹

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁵ Osland Depo. at 11-12.

⁶ *Id.* at 12.

⁷ *Id.* at 13-14.

⁸ *Id.* at 11.

⁹ Murati Depo. at 16.

And anyone who says otherwise “doesn’t understand anatomy.”¹⁰ He explained that as claimant repetitively hurt his shoulder, he developed tension that moved into his neck. Dr. Murati points to the foraminal encroachment test that Dr. Osland performed as further evidence that claimant has suffered impairment in his neck structure. And claimant also exhibited scapular winging in his upper back, a finding which no other physician made, which is, according to Dr. Murati, suggestive of radiculopathy. Dr. Murati further testified that he fully understands why claimant is not improving as no one has yet fixed the nerve entrapment in his arm.¹¹

Dr. Murati adopted the vocational analysis and task loss opinion expressed by Jerry Hardin and opined that claimant sustained an 84 percent task loss as a result of his work-related injury, based upon his restrictions.

Claimant saw Dr. Pat Do for a court ordered Independent Medical Examination on March 6, 2006. Dr. Do noted that since being evaluated by Dr. Osland claimant has continued to complain of significant pain in the right shoulder which radiates into the neck and causes the claimant to have headaches.¹² Claimant denied any numbness or tingling in his hand and denied any left upper extremity symptoms.

Upon examination, Dr. Do noted persistent right shoulder pain, status post subacromial decompression, SLAP repair and distal clavicle excision.¹³ Dr. Do recommended the following restrictions: occasional overhead reaching, no lifting over 50 pounds, frequent lifting 20-50 pounds, continuous lifting 0-20 pounds. He went on to assign an impairment rating of 9 percent to the right shoulder for diminished range of motion and 10 percent for distal clavicle excision for a combined impairment of 18 percent to the upper extremity which converts to a 11 whole person impairment.¹⁴

Given the dispute between the parties as to the extent of claimant’s permanent impairment, Dr. Do was questioned about his rating and whether claimant’s impairment extended to his neck, and was considered a whole body non-scheduled impairment.

Q. So do you think the injury that Miguel had went beyond the shoulder area into the trapezius or paracervical area?

A. It goes into the paracervicals and trapezius muscles because the muscles spasm into those areas to protect the injured extremity. It is not a separate injury.

¹⁰ *Id.*

¹¹ *Id.* at 17.

¹² Do Depo., Ex. 2 at 1 (March 9, 2006 IME report).

¹³ *Id.*, Ex. 2 at 2 (March 9, 2006 IME report).

¹⁴ *Id.*

It is a natural response. I don't know if the answer would be a whole person, but it probably should be an upper extremity impairment only.

Q. That is what I am wondering about, the distinction.

A. It should be an upper extremity.

Q. Even though there is the symptomatology in the paracervicals and trapezius?

A. Yes, sir.

Q. Why doesn't the paracervicals and trapezius involvement take it beyond the shoulder?

A. It is going to spasm. It is not a separate problem. For instance, it would be a whole body if he injured his neck or had a neck injury, but the muscles -- if you went jogging and you injured your knee or your ankle, your muscles around your calf are going to hurt because it is going to spasm. But I don't think the guides intended that that reflex response is part of a whole body impairment. Usually I don't translate it to any kind of whole body. It may be I wanted to give Judge Clark that option if he wanted to look at that option. But if you are asking if this is a scheduled injury, it is probably a scheduled injury with just the upper extremity.¹⁵

The ALJ adopted Dr. Do's analysis and awarded claimant an 18 percent permanent partial impairment to the shoulder only. The ALJ's finding is well supported by the evidence and is hereby affirmed. Not only did Dr. Do testify that claimant's impairment is limited to the right shoulder, so did Dr. Osland. While it is true that the two of them converted those findings to whole body impairment ratings, that effort was done merely as a convenience and not as a reflection of further impairment beyond that afforded by the schedule, K.S.A. 44-510d. Both Drs. Osland and Do testified that spasms into the paraspinals do not necessarily yield a whole body impairment. It has long been held that the determination of whether the claimant has sustained a scheduled or a non-scheduled disability is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.¹⁶ Here, the resulting disability is to the shoulder only. The existence of spasms is, standing alone, not sufficient under these facts to support a whole body impairment. Going on, the Board is not persuaded by the opinions of Dr. Murati. His diagnosis seems to be rather fluid, in that he first diagnosed carpal tunnel which was referring pain into his shoulder along with a rotator cuff tear. No other physician identified these problems, including the surgeon who arthroscopically examined claimant's shoulder. And after surgery, Dr. Murati then diagnosed right ulnar cubital tunnel, an altogether different diagnosis.

¹⁵ *Id.* at 8-9.

¹⁶ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

Like the ALJ, the Board is persuaded by Dr. Do and his opinion and finds the ALJ's Award granting 18 percent permanent partial impairment to claimant's right shoulder should be affirmed. Because claimant's impairment is limited to a scheduled injury under K.S.A. 44-510d, he is not entitled to any permanent partial general (work) disability under K.S.A. 44-510e(a).

The Board also finds that the TTD benefits should be affirmed. Dr. Murati testified claimant should not have been working without restrictions after March 24, 2004 to July 26, 2004, when he was formally issued restrictions by a subsequent physician. Similarly, Dr. Osland testified that assuming claimant's condition had not changed from March 24, 2004 to the time he first saw him in February 2005, claimant should have had restrictions on his work activities dating back to March 24, 2004. Based upon claimant's testimony and his recitation of his complaints when he saw Dr. Murati and Dr. Osland, the Board is persuaded that claimant should be awarded TTD for that period. Accordingly, the ALJ's award of TTD from March 24, 2004 to July 26, 2004 is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 28, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge